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OCTOBER TERM, 1978

Nos. 78-432, 78-435 and 78-436

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,
v.
BRIAN F. WEBER, ET AL.,
Respondents,

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,
v.
BRIAN F. WEBER,
Respondent,

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,
v.
BRIAN F. WEBER, ET AL.,
Respondents,

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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INTEREST OF *AMICUS CURIAE* *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fifteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

Our extensive litigation program against employment discrimination is conducted through our privately funded Government Employment Project (providing representation to federal, state, and local government employees claiming unlawful employment discrimination), through our Equal Opportunity Employment Project (which provides representation to private-sector plaintiffs), and through the general litigation activities of our Mississippi and Washington offices and other local affiliates. In this case, Kaiser and the USWA have sought through voluntary action to come to terms with the gross underrepresentation of minorities in the skilled crafts in Kaiser's plants by providing for access to a newly created training program by white and black workers on a one-for-one basis. If the attack on this system is successful, we believe, as Judge Wisdom said in his dissent, that the ultimate effect will be the end of voluntary compliance with Title VII. 563 F.2d at 230.

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* The parties' letters of consent to the filing of this brief are being filed with the clerk pursuant to Sup. Ct. Rule 42(2).

We have previously addressed the issue of race-conscious affirmative action programs, in the context of higher education, in our *amicus* briefs filed in *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), and *Regents of the University of California* v. *Bakke*, 57 L.Ed.2d 750 (1978). Because the issues presented by this case are vitally important to the realization of the goal of equal employment opportunity for blacks, the Committee files this brief urging reversal of the judgment below.

INTRODUCTORY STATEMENT

The agreement reached by Kaiser and the United Steelworkers of America (USWA) in this case was taken as a "'remedial' measure in response to pending litigation concerning minority and female employment"[1] and in response to threats by the Office of Federal Contract Compliance (OFCC) concerning Kaiser's affirmative action obligations. The agreement called for the establishment of training programs at Kaiser's 15 plants to train current employees for crafts positions. At the time the agreement was consummated in 1974, Kaiser's plant at Gramercy, Louisiana was approximately 85% white and 14.8% black. Black representation in the crafts was only 2-2.5%. Because the area from which the work force was hired was about 40% black in population, a goal of 39% minority representation was established for each of the crafts families.

[1] The court of appeals' statement that the collective bargaining agreement was entered into to avoid *future* litigation, 563 F.2d at 218, is wrong. Supplemental Agreement to Collective Bargaining Agreement, Art. IX ¶ 1 (Feb. 1, 1974). *See* Complaint ¶ 5 and Answers of Kaiser and USWA ¶ 5. At the time of the agreement, Kaiser was defending Title VII litigation involving its two other plants in Louisiana located at Chalmette and Baton Rouge. *Parson* v. *Kaiser Alum. & Chem. Corp.*, 575 F.2d 1374 (5th Cir. 1978); *Burrell* v. *Kaiser Alum. & Chem. Corp.*, Civ. Action 67-86 (M.D. La.) (consent decree, Feb. 24, 1975).

Entrance into the training program depended almost exclusively on seniority, but since there were far more whites with greater seniority than blacks, without some equalizing mechanism, few blacks if any would have gained entrance into the program. Since this would have defeated the whole purpose of the program, the parties agreed in a Memorandum of Understanding that vacancies would be filled by selecting the white and black applicants with the greatest seniority on a one-to-one basis. The court of appeals held that this two-track system violates Title VII.

This Court's decision in *Bakke* teaches that, in determining the validity of race-conscious affirmative action programs, important distinctions must be drawn based on the statutes involved and the context of the particular case. The parties to this action disagree as to the scope of the question presented. We suggest that the narrow issue before the Court is whether Executive Order 11246 and its implementing regulations authorize government contractors to implement race-conscious affirmative action programs, involving quotas when necessary, to increase minority representation in the skilled trades, and, if so, whether the Executive Order conflicts with Title VII or is otherwise invalid.

The nub of the court of appeals' ruling is that, because past discrimination at the Gramercy plant was not proven, the "remedial" program devised by Kaiser and the USWA became a "racial preference" in violation of Title VII which even a court could not have ordered. 563 F.2d at 224. This holding utterly ignores the most singular aspect of this litigation—that none of the parties involved had the slightest interest in establishing the existence of past discrimination. It blinks reality to apply the same standards applicable to other Title VII litigation to this set of circumstances. The law must be flexible enough to devise standards that are meaningful so as not to result in self-

fulfilling prophesies concerning proof of issues concerning which the parties lack adversity.[3]

The purpose of this brief is to suggest a framework for analysis for determining the validity of racial quotas in cases such as this. Whatever standard is adopted should further the clear Congressional purpose of facilitating voluntary compliance in assuring equality of employment opportunity. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

We propose the following standard: a race-conscious affirmative action plan should be immunized by Executive Order 11246 from violating Title VII if a government contractor shows *either* (1) a reasonable belief that a *prima facie* case of racial discrimination against blacks can be established, *or* (2) a reasonable belief that part of his work force underutilizes minorities and women and that, unless corrective action is taken, he may be subject to sanctions by the OFCC. If either of these is met, then

[3] The only witnesses to testify at trial were two white workers and two Kaiser officials. The USWA put on no witnesses. Considering that neither party could benefit by a showing that past racial discrimination had occurred, it is remarkable that the record contains as much information as it does. *Amicus* believes that the statistical evidence before the Court in fact constitutes a *prima facie* case of racial discrimination. On this record we believe it unnecessary for the Court to determine the minimum threshhold of evidence required to permit a federal contractor to implement an affirmative action plan of the Kaiser design to claim the protection of Executive Order 11246.

We believe that the "two-court" rule should not be applied in this case because there was "obvious and exceptional" error in the lower courts' assessment of the facts concerning prior discrimination. *Berenyi* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967). This error is exemplified by the court of appeals' treatment of discrimination in the limited training program in effect until 1974 as *de minimis;* in its failure to mention the five years' experience requirement previously used to hire craftsmen; and in its failure to consider 1970 census data showing that blacks accounted for 21.3% of the craftsmen, foremen, and kindred workers in the two parishes from which Kaiser drew its work force.

the contractor must show that the means chosen to increase the number of minorities in the work force is the least onerous alternative available. If he meets this burden, then the contractor is immune from liability under Title VII.[4]

SUMMARY OF ARGUMENT

I.

1. Executive Order 11246 exempts a government contractor from liability under Title VII when he implements a race conscious affirmative action plan designed to increase minority representation in the skilled crafts which have historically excluded blacks. The Executive Order permits the use of quotas and the legislative history of the 1972 amendments to the Civil Rights Act of 1964 demonstrates conclusively that Congress was aware of, and approved, the use of preferential treatment, including quotas, under the Executive Order.

2. Past discrimination need not be shown in order for a government contractor to qualify for the exemption. It

[4] If a race-conscious affirmative action plan were attacked by a white employee, at trial the contractor would establish his immunity under Executive Order 11246 by proving the required elements as described in the text. Once these elements were established, he would be entitled to a dismissal of the complaint. He need not establish a compelling need for the program, for as we argue, *infra*, the Executive Order itself shows a compelling governmental interest in affirmative action by government contractors.

Since non-government contractors are not covered by Executive Order 11246, their burden would be different. Obviously, the second part of our suggested standard—underutilization of minorities—would not apply: a non-government contractor is not aided by the powerful government interests underlying the Executive Order that all share equally in the jobs generated by the federal government's spending. As a defense to a Title VII suit, a non-government contractor must show some link to past discrimination in his plant to justify an affirmative action plan. A reasonable belief that a *prima facie* case of racial discrimination against blacks could be established should be sufficient.

is sufficient that he have a reasonable belief in the existence of a *prima facie* case of racial discrimination or that he is out of compliance with OFCC requirements concerning minority representation, and that the means chosen are the least restrictive alternative available. The record in this case amply demonstrates that Kaiser's program meets that standard.

II.

Because the Executive Order throws a mantle of protection over government contractors in creating race conscious affirmative action programs, it must be shown to be a valid exercise of Executive authority, and, in addition, to comply with equal protection principles of the Fifth Amendment. We assume, *arguendo*, that the most exacting judicial scrutiny is required. Executive Order 11246 and its predecessors have repeatedly been upheld as a valid exercise of the Executive power and the 1972 amendments to the Civil Rights Act of 1964 show Congress' express ratification of the federal contract compliance program including the use of quotas. The governmental interest that minorities not be excluded from jobs created by federal expenditures is compelling and the quota system used by Kaiser to admit blacks to the skilled crafts is necessary to promote this interest.

ARGUMENT

I. FEDERAL CONTRACTORS ARE IMMUNE FROM LIABILITY UNDER TITLE VII WHEN THEY CREATE AFFIRMATIVE ACTION PROGRAMS TO MEET THEIR OBLIGATIONS UNDER EXECUTIVE ORDER 11246.

(1) Executive Order 11246.

In 1941, President Roosevelt, at the behest of civil rights forces, issued the first in a series of Executive Orders designed to put an end to employment discrimination by government contractors. Executive Order 8802, June 25, 1941, 6 Fed. Reg. 3109 (June 1941), U.S. Code Cong. Service 1941, p. 860. For 20 years, a succession of Executive Orders carried forward the policy of nondiscrimination in government procurement and in the defense industry.[4] After 1943, the Executive Orders required all government contracts to include a clause obligating employers not to discriminate on the basis of race, color, creed, or national origin. Due to the ineffectiveness of this approach, in 1961 President Kennedy extended this requirement to include affirmative action. Executive Order 10925, 26 Fed. Reg. 1977, 3 C.F.R. 1959-63 Comp. 448. The obligations of governmental contractors are currently set forth in Executive Order 11246.[5] The Executive Order has been upheld as a "valid

[4] The successive Executive Orders are described in *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159, 168-70 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971). *See also*, Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev. 723, 725 n.25 (1972).

[5] Executive Order 11246 provides, in pertinent part:

> The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. § 202(1).

effort by the government to assure utilization of all segments of society in the available labor pool for government contractors, entirely apart from Title VII." *Equal Employment Opportunity Commission* v. *American Telephone & Telegraph Co.*, 556 F.2d 167, 175 (3rd Cir. 1977), cert. denied, 98 S.Ct. 3145 (1978).

Without any consideration of the legislative history, the court of appeals in this case held that Executive Order 11246, insofar as it mandates racial quotas for admission to on-the-job training programs, cannot be harmonized with § 703(d) of Title VII and is therefore invalid. An examination of the legislative history of the 1972 amendments to the Civil Rights Act of 1964 demonstrates that the Congress (1) knew that the Executive Order mandated the use of quotas, and (2) did not regard the Executive Order as being in conflict with the terms of Title VII.

(a) *Congress knew that Executive Order 11246 expressly provided for the use of quotas to ensure that blacks were not excluded from jobs created by the expenditure of federal funds.*

It is clear from the legislative history of the 1972 amendments that Congress was fully aware that quotas—in the strict sense of the word—were mandated by the Executive Order. One of the major procedural questions which the Congress addressed was whether to transfer all the authority, functions, and responsibilities of the Secretary of Labor pursuant to the Executive Order relating to contract compliance to the Equal Employment Opportunity Commission. Section 717(f) of H.R. 1746, P.L. 92-261. A major issue that emerged in the debates was whether, if the amendment were approved, Title VII would prohibit affirmative action, including the use of racial quotas, which was authorized by the Executive Order. Much of the discussion in the debates focused on the Philadelphia plan, whereby the OFCC had imposed affirmative action requirements utilizing goals for hiring

minorities as a precondition for federal assistance for certain construction projects.[6]

In opposing the transfer of the OFCC's functions to the EEOC, Rep. Green expressed her concern that, if the transfer occurred, the EEOC might decide that it had authority to impose racial quotas, which it was forbidden to do by Title VII. Her understanding of Title VII was that "[u]nder Title VII, (Sec. 703(j)) EEOC is expressly prohibited from imposing racial quota requirements. Under the Executive Order, there is authority to require an affirmative action plan including the imposition of racial quotas." She regarded "the Philadelphia Plan [as] such a quota plan." H. Rep. 92-238, 92nd Cong. 1st Sess. 68 (1971) (Separate views of Rep. Green of Oregon).[7]

To ensure that the EEOC would not misinterpret the extent of its authority in the event that the federal contract compliance program was transferred to its jurisdiction, Rep. Dent introduced an amendment that defined

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[6] In 1969, a preliminary skirmish had been fought over the quota issue. The Comptroller General objected to the Philadelphia plan as violating Title VII because it approved quotas. He refused to approve expenditures for projects approved under it. The Attorney General issued a contrary opinion and directed the Secretary of Labor to administer the plan. The Comptroller General then sought to have a rider attached to a pending appropriations bill to limit "the use of funds to finance any contract requiring a contractor or subcontractor to meet, or to make every effort to meet, specified goals of minority group employees." 115 Cong. Rec. 40,018 - 40,019 (1971). The rider, known as the Fannin rider, was defeated. The episode is described in 39 U.Chi.L.Rev., *supra*, at 747-50. As the comment points out, because the measure was a rider attached to an appropriations bill, it would be overstating the case to regard this as ratification by Congress of the Philadelphia Plan. No such ambiguity attends the debates on the 1972 Amendments.

[7] Reprinted in Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972 (hereafter *Legislative History*), at 128. Rep. Green had submitted an amendment in committee which would have made Title VII take precedence in case of conflict. That amendment had been rejected.

the EEOC's powers in enforcing the Executive Order. His amendment would have prohibited the Commission from imposing or requiring quotas or preferential treatment in the administration of the federal contract compliance program.[8] *Legislative History* 190. He explained that:

> Such a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under Title VII. My amendment would, for the first time, apply these restrictions to the Federal contract-compliance program.

Legislative History 190.

Rep. Quie, in discussing the transfer of power to the EEOC, emphasized that "the OFCC does not operate under the provisions of the Civil Rights Act and its procedures and sanctions are completely different from those of the Act, . . ." *Legislative History* 202. He anticipated great difficulties arising "from the fact that the OFCC has imposed requirements on Federal Government contractors which it is questionable may be imposed under the statute." *Id.*

Rep. Green stated that Title VII "had always prohibited the establishment of quotas", *Legislative History* 209, but that "Executive Order 11246 under which the Philadelphia Plan was put into effect, in my judgment clearly did establish quotas." *Legislative History* 210. She then stated that it would be impossible for her to support the committee bill without some amendments, including a "Congressional prohibition against establishing any quota system—a prohibition against preferential treatment for some at the expense of others, a prohibition against 'reverse discrimination', if you will." *Ibid.* After describing how the OFCC had, in a highhanded manner, imposed quotas in a plant in Portland, she then stated that the purpose of the amendment was

> to give this House the right to decide whether or not we want to amend the Civil Rights Act and to say whether we are going to establish quotas by law. H.R. 1746, the committee bill, on page 29, freezes Executive Order 11246 into the law. If this were passed without amendment, we would be giving our approval to the quota system.

Legislative History 210, 211.

In an exchange between Rep. Pucinski and Rep. Dent, the latter made clear that in his mind there was no distinction between the word "goal" and the word "quota" and that under his amendment any preferential treatment, including quotas, would be forbidden:

> Mr. Pucinski. And, this amendment would bring Title VII into this Commission's activities? In other words, if this amendment is adopted, the Commission cannot claim it as exempt from Title VII of the Civil Rights Act nor can the Commission require quotas or goals in assigning job distribution?
> Mr. Dent. Right; it cannot require quotas.

Legislative History 235.

As a final example, Rep. Steiger stated that he was "absolutely appalled" at the Dent amendment, "which is aimed at subverting the Philadelphia plan and the Office of Federal Contract Compliance's effort to carry forward an affirmative action program." *Legislative History* 222. He went on to say, with particular relevance for this case:

[8] The amendment read:

> The Commission shall be prohibited from imposing or requiring a quote [sic] or preferential treatment with respect to numbers of employees, or percentages of employees of any race, color, religion, sex or national origin. *Legislative History* 189.

> I think an effort has been made to end the other program [i.e., the federal contract compliance program] designed to ensure an increase in the abiilty of the minority people to gain some place in those trades in which the salaries are high and in which they have a certain opportunity to be *skilled craftsmen* in the society. *Ibid.* (Brackets and emphasis added.)

The Dent amendment was defeated. 117 Cong. Rec. H. 8540 (daily ed. Sept. 16, 1971).

This is but a small sampling of statements made during the debate in the House and Senate demonstrating that Congress understood that the Executive Order authorized affirmative action, including quotas, and that Title VII did not in the absence of prior discrimination.[9]

(b) *Congress did not regard the Executive Order as conflicting with Title VII.*

The Senate was also fully informed as to the remedial differences between Executive Order 11246 and Title VII. Sen. Javits explained how the OFCC had interpreted the concept of affirmative action "as something more than just the duty not to engage in active discrimination in hiring." *Legislative History* 648.

> Under this concept of affirmative action OFCC has been able to promulgate plans, such as the Philadelphia plan, and numerous similar plans in other cities throughout the country, under which contractors agree to undertake good faith efforts to increase the utilization of minority group employees and women *without reference to whether they are actually guilty of illegal discrimination. Ibid.* (emphasis added)

[9] The relevant debates in the House appear in *Legislative History*, pp. 128, 209-211, 260-261, 287 (remarks of Rep. Green); 190, 255, 234-235 (remarks of Rep. Dent); 202 (remarks of Rep. Quie); 208-209, 230-231, 283-34 (remarks of Rep. Erlenborn); 208-209 (remarks of Rep. Hawkins); 222, 224 (remarks of Rep. Steiger); 234-235 (remarks of Rep. Pucinski); and 259 (remarks of Rep. Gerald R. Ford).

In the Senate, the relevant debate is found at: 515 (remarks of Sen. Allen); 648-649, 1046-1048 (remarks of Sen. Javits); 915-917 (remarks of Sen. Saxbe); 921 (remarks of Sen. Williams); and 1042-1045, 1101, 1714-1717 (remarks of Sen. Ervin).

He went on to point out that Title VII "is strictly a nondiscrimination law. Affirmative action may be ordered, but only as a remedy in a case of proven discrimination." *Legislative History* 649. He continued that, if OFCC's powers were transferred to the EEOC, "[t]he result might be confusion in the agency and confusion in the minds of Federal contractors in dealing with the agency, or a watering down of the Executive Order program so that it and the Title VII program become indistinguishable." *Id.*

Sen. Saxbe gave emphasis to the point:

> The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. *Proof of overt discrimination is not required.* (emphasis added)

Legislative History 915. In opposing the transfer of functions to the EEOC, Sen. Saxbe stated: "The affirmative action concept as innovatively and successfully employed by the OFCC has been challenged as a violation of Title VII—the courts have responded by stating that the Executive Order program is independent of Title VII and not subject to some of its more restrictive provisions." *Id.* 916. He foresaw that placing the Executive Order program under Title VII would give rise to renewed challenges. *Id.* 917.

The failure of the effort to merge the OFCC program into the EEOC was the prelude to a major battle in the

Senate—orchestrated by Senator Ervin—to subject the Executive Order to Title VII's anti-discrimination provisions and annihilate the affirmative action program. The conflict has been described in Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev., *supra*, at 754-757, and will not be repeated in depth here.

Briefly, an amendment offered by Sen. Ervin would have provided that: "No department, agency or officer of the United States shall require an employer to practice discrimination in reverse by employing persons of a particular race, or a particular religion, or a particular national origin, or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges." 118 Cong. Rec. S. 691 (daily ed. Jan. 28, 1972). This amendment was decisively rejected. Because, in addition to attacking the Philadelphia Plan, the amendment could be read to deprive even courts of power to remedy proven cases of discrimination by quota relief, its defeat arguably is not a clear-cut statement of support for the Executive Order affirmative action program. Any uncertainty on this score was soon resolved.

Sen. Ervin introduced another amendment which would have amended § 703(j) of Title VII to proscribe completely the OFCC's affirmative action program.[10] This

[10] The amendment provided:

> Nothing contained in this title or in Executive Order No. 11246, or in any other law or Executive Order, shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title or to any other law or Executive Order to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

118 Cong. Rec. S. 2275 (daily ed., Feb. 27, 1972).

was to be accomplished by extending § 703(j) to cover explicit remedies devised under the Executive Order Program. In describing the amendment, Sen. Ervin said:

> Anyone who is desirous of understanding this amendment can read the amendment in the light of subsection (j) of § 703 of the Civil Rights Act of 1964 and understand what it would do. It is designed to make the prohibition upon preferential treatment created by this subsection of the original act applicable not only to the EEOC, but also to the Office of Contract Compliance and to every other executive department or agency engaged, either under the statute or under any Presidential directive, in enforcing the so-called equal employment opportunity statute.

Legislative History 1714. Sen. Javits responded by saying that it would make plans like the Philadelphia Plan unlawful and by including the Executive Order, preclude the federal government as an employer from putting such a plan into effect. *Legislative History* 1715. The amendment was decisively defeated. *Legislative History* 1716-17.

The rejection of this amendment conclusively demonstrates (1) that the affirmative action provisions of the Executive Order are neither governed by nor in conflict with § 703(j) of Title VII and[11] (2) that programs of preferential treatment, including quotas, are a permissible means of enforcing the Executive Order.

[11] The court of appeals held that the Executive Order conflicts with § 703(d) of the Civil Rights Act relating to admissions to on-the-job training. 563 F.2d at 227. There is absolutely nothing in the legislative history that suggests Congress intended to ratify the authority of the OFCC to implement affirmative action plans to the exclusion of on-the-job training programs.

(2) The Standard of Review for validating affirmative action programs established by government contractors to meet their obligations under Executive Order 11246.

While Executive Order 11246 exempts race-conscious affirmative action plans created to satisfy OFCC requirements, that does not mean that employers are without any constraints whatsoever in setting up such a plan. What is required is a standard that makes sense in the special context of the Executive Order.[12]

We believe that a government contractor who can demonstrate either a reasonable belief that a *prima facie* case of discrimination against blacks could be made out against him or that he might incur sanctions from the OFCC because of low utilization of minorities in his work force (or skilled crafts as here) should be able to create a race conscious AAP if he demonstrates that the particular plan adopted is necessary under the circumstances. This standard satisfies the policies underlying the Executive Order and protects the rights of white workers by requiring that the plan be carefully tailored.

Executive Order 11246 does not require proof of overt past discrimination to justify an affirmative action program—rather, it looks at the composition of the employer's work force. See *Legislative History* 648 (Remarks of Sen. Javits); 915 (remarks of Sen. Saxbe); 921 (remarks of Sen. Williams). *Cf. E.E.O.C.* v. *A.T.&T., supra* (consent decree denying violations). Under 41 C.F.R. 60-2.11, non-exempt employers must undertake a utilization analysis which must be filed with the OFCC.[13] A

[12] Judge Wisdom suggests in his dissent that, if an affirmative action program adopted in a collective bargaining agreement is a reasonable remedy for an arguable violation of Title VII, it should be upheld. 563 F.2d at 230.

[13] " 'Under-utilization' is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their avialability." 41 C.F.R. 60-2.11(b). Factors to be considered are:

[Footnote continued on page 17]

federal contractor who implements an affirmative action plan because minorities are under-utilized is motivated by the desire to protect all its employees against loss of jobs. If the company is "debarred" or incurs other sanctions, all employees, white and black, suffer. (Tr. 130). A reasonable program designed to prevent this from happening should be upheld.

Alternatively, as Judge Wisdom pointed out, an employer should not have to wait to be sued by black employees before taking affirmative action. If he has a reasonable belief that a *prima facie* case of liability could be established, this, too, should justify the creation of a reasonable program.[14]

In either case, the utilization analysis should provide the basis for determining whether the employer could form such a reasonable belief.

[13] [Continued]

(1) The minority population of the labor area surrounding the facility;

(2) The size of the minority unemployment force in the labor area surrounding the facility;

(3) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(4) The general availability of minorities having requisite skills in the immediate labor area;

(5) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(6) The availability of promotable and transferable minorities within the contractor's organization;

(7) The existence of training institutions capable of training persons in the requisite skills;

(8) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

[14] Of course, the existence of an OFCC agreement does not provide a company with a defense to a Title VII action which demonstrates that the AAP is ineffective and fails to eliminate present effects of past discrimination. *Swint* v. *Pullman-Standard*, 539 F.2d 77, 95 n.44 (5th Cir. 1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 106 (5th Cir. 1975).

It is also appropriate, in the case of a government contractor, to impose a requirement that he demonstrate that his plan is necessary to the accomplishment of a legitimate and substantial governmental interest.[15]

(a) *Kaiser was justified in instituting a race conscious affirmative action plan under either the* prima facie *case standard or the "underutilization" standard.*

The record amply demonstrates that Kaiser agreed to the training program and the two-track seniority system at least in part to comply with threats by the OFCC conditioning federal contracts on appropriate affirmative action. 563 F.2d at 218. This in itself should justify the creation of an affirmative action plan to train minorities in the skilled crafts.

Furthermore, evidence introduced at trial and which is available as a matter of public record demonstrate that Kaiser could reasonably have believed that a *prima facie* case of past racial discrimination could have been established.

First, statistical evidence demonstrated a *prima facie* case of discrimination against blacks in hiring for unskilled jobs. The production force in 1974 was only 14.8% black as compared with the area work force of 39% black. Tr. 94-95. Even this figure was up sharply from 1969 when Kaiser began hiring on a one-to-one black-white ratio under pressure from the OFCC. From 1958 to 1969, Kaiser hired off the street on a "best qualified" basis. The disproportionately low number of blacks hired could have been the result of using "non-validated" tests or improperly subjective processes. Discrimination in these hires could naturally affect the ability of blacks to enter the training program instituted in 1974 because fewer blacks would have the necessary seniority to make them competitive with whites. 563 F.2d at 231.

Secondly, until 1974, Kaiser had a limited training program for two crafts: carpenter-painter and general repairman. (Tr. 101-102). Eligibility for these programs required experience as well as seniority. (Tr. 110) Out of 28 trainees in the two programs only two were black. Thus, with two exceptions, the prior experience requirement kept blacks out of the training program. (Tr. 135) Nothing in the record suggests that Kaiser attempted to recruit blacks for the training program. Its post-1970 recruiting of blacks—the only recruiting it ever undertook—extended only to blacks who were fully qualified craftsmen. (Tr. 99)

The court of appeals seems to acknowledge that, but for the small numbers involved, a *prima facie* case of discrimination was made out. The court concluded that, in view of the limited scope of the program, the prior experience requirement could not be regarded as an unlawful employment practice. 563 F.2d at 224 n.13. However, the size of the program does not immunize it. *Green* v. *McDonnell Douglas Corp.*, 411 U.S. 792 (1973). Indeed, in this very case the majority found Title VII violated because it gave preference to seven blacks.

Thirdly, Kaiser required five years' (subsequently reduced to three) experience to be hired into the "journey-

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[15] If the Executive Order exempts race conscious affirmative action plans from the operation of Title VII, the constitutionality of the Executive Order itself is called into question. In *Bakke*, Justices Brennan, Marshall, White and Blackmun held that racial classification designed to further remedial purposes "must serve important governmental objectives and must be substantially related to achievement of those objectives." 57 L. Ed. 2d at 814. Mr. Justice Powell held that a race conscious program must be subjected to the most exacting scrutiny under the Constitution. Since we believe that race conscious programs under the Executive Order serve a compelling governmental interest and that the particular plan used by Kaiser is the least restrictive alternative under the circumstances, we analyze the issue using the more rigorous standard of review. If Kaiser's program meets the standard applied to "suspect" classifications, *a fortiori* it would meet the "substantial relationship" test.

In Section II we take up the questions of whether the Executive Order is constitutional and whether affirmative action using quotas serves a compelling governmental interest.

man top paying standard rate craftsman classification" (Tr. 111). Prior to 1974, only five blacks were in all the crafts combined; two of the blacks had gone through the limited training program (Tr. 112). Until 1974, the company was unable to hire a black journeyman off the street (Tr. 112). There was no showing that the experience requirement was necessary and, indeed, the fact that it was shortened from five to three years suggests that it was not.

Fourth, Kaiser maintained that the reason more black craftsmen were not hired prior to 1974 (there were five out of 290 craft workers at the Gramercy plant) was due to the lack of black craftsmen in the area. Kaiser's industrial relations expert testified at trial that the great majority of all employees at the plant were hired from St. James and St. John the Baptist parishes. 415 F. Supp. at 764. And it was the population of these two parishes that was used to establish the goal of 39% minority for each of the craft families at the Gramercy plant. (Tr. 95).

Census figures show that in 1970, 432 of 2,029 or 21.3% of workers in those two parishes classified as Craftsmen, Foremen, and Kindred Workers, were black.[16]

[16] OCCUPATION OF EMPLOYED PERSONS
16 Years of Age and Over
1970

Craftsmen, Foremen, and Kindred Workers	Total	Black	Black %
Louisiana:	167,860	25,901	15.4%
New Orleans SMSA:	49,641	8,897	17.9%
Baton Rouge SMSA:	15,884	2,703	17.0%
St. James Parish:	783	179	22.9%
St. James and St. John the Baptist:	2,029	432	21.3%

Source: U.S. Bureau of the Census, Census of Population: 1970 General Social and Economic Characteristics, Louisiana.
State data: Table 54
SMSA data: Table 86 (totals)
Table 93 (blacks)
Parish data: Table 122 (totals)
Table 127 (blacks)

The black craft population at Gramercy was only 2-2.5% in 1974. 415 F. Supp. at 764.

Fifth, assuming the alleged lack of available black craftsmen was caused by discrimination by craft unions, and, as Kaiser claims, not by its own hiring policies,[17] the company's failure to institute a large-scale training program to reduce its dependency on so discriminatory a source of craftsmen, is itself a *prima facie* violation of Title VII. Because the requirement of prior experience tended to exclude blacks at such a high rate, it was unlawful unless justified by "business necessity". *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425-26 (1975). No such justification has been offered.

Finally, the two documents lodged with the clerk by the United States in this case demonstrate (1) that craft employment practices at the Gramercy plant were out of compliance with OFCC anti-discrimination requirements (1971 Compliance Report) and (2) that prior experience requirements for transfer to maintenance crafts were not validated and had been waived for whites but not for blacks.

(b) *The two-track seniority system used at the Gramercy plant was the least restrictive viable alternative.*

The problem confronted by Kaiser and the USWA was that as of 1974, of the 290 craftsmen at the Gramercy plant, only five, or approximately 2%, were black. The

[17] *But see Parson* v. *Kaiser Alum. & Chem. Corp., supra*, 575 F.2d at 1381-1382, 1389-1390. In a footnote, the court distinguished the *Weber* case with the statement that "Kaiser went too far . . . by imposing a hiring quota of a minimum number of blacks in a plant where no prior discrimination *could* be shown." 575 F.2d at 1374 n.35 (emphasis added). As discussed above, we consider it disingenuous to equate what the parties to that lawsuit were interested in showing and what might have been shown if their interests had been truly adverse on that particular issue.

two-track system based on seniority was not only reasonable under the circumstances, but was necessary if blacks were to have any real chance of being able to participate in the training program.

First, it cannot be argued in the present context that application of a quota in any way interferes with merit-based hiring. All the applicants were equally well qualified to participate in the training program. For all intents and purposes, the only measure of selection was seniority. (Tr. 105, 114)

Second, a Kaiser official testified that in the absence of a race conscious program "very few blacks . . . would get into any of the crafts for quite a while." (Tr. 113).

Third, unlike the situation in higher education, this would be an inappropriate situation to consider race as one of several relevant factors. Unlike a university, an industrial employer has no justifiable interest in a diverse work force. Selection for crafts training has traditionally been based on seniority under collective bargaining agreements.

Fourth, in view of the fact that Kaiser claims that it had exhausted the supply of skilled blacks in the area, the only way to increase minority representation in the crafts families was through the implementation of a training program.

Fifth, the system aided both whites and blacks because both groups had an opportunity to enter the crafts which they did not have previously.

Sixth, the quota agreed upon was not an absolute quota in the sense that it reserved all the spaces in the training program for blacks. *See Carter* v. *Gallagher*, 452 F.2d 315, 327 (8th Cir. 1971) (on petition for rehearing *en banc*), *cert. denied*, 406 U.S. 950 (1972).

Seventh, a lesser ratio such as 1 black to 2 whites would not have been effective. Even using the 1-1 hire ratio, it was estimated by a Kaiser official that it would take a minimum of 10 years to achieve the 39% figure and possibly never, depending upon Kaiser's needs and turnover. (Tr. 108-109).

Eighth, using a random sampling, given the racial composition of the labor force, would have produced few, if any, blacks.

Ninth, the 1-1 ratio was temporary. Under the agreement it was understood that once the goal of 39% was achieved, Kaiser would revert to the ratio needed to keep minority representation equal to the representation in the community work force population. (Tr. 109-110).

Given the particular facts of this case, the 50-50 hiring ratio for acceptance into the training program was the least restrictive viable alternative.

II. EXECUTIVE ORDER 11246 IS A VALID EXERCISE OF THE EXECUTIVE POWER WHICH SERVES COMPELLING GOVERNMENTAL INTERESTS.

(a) *Executive Order 11246 was issued pursuant to statutory authority and has the force and effect of law.*

The authority of the President to issue Executive Order 11246 and its predecessors has repeatedly been upheld. *United States* v. *New Orleans Public Service, Inc.*, 553 F.2d 459 (5th Cir. 1977) (NOPSI); *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor, supra; Farkas* v. *Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967) (Exec. Order 10925); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3 (3rd Cir. 1964) (Exec. Order 10925 and prior orders). The authorization has variously been found in Art. II of the Constitution, which commands the President

to "take care that the laws be faithfully executed", the due process clause of the Fifth Amendment, explicit Congressional authorization in 40 U.S.C. § 486(a), and implied Congressional ratification in Title VII of the Civil Rights Act of 1964 and the debates surrounding the 1972 amendments. Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1275-80 (1971); *United States* v. *New Orleans Public Service, Inc., supra.* In *NOPSI, supra,* the court isolated three sources of legislative authority for Executive Order 11246: the President's express statutory authority concerning federal procurement; the Civil Rights Act of 1964; and the debates over the 1972 amendments.

40 U.S.C. § 486(a) authorizes the President to issue orders to implement the Federal Property and Administrative Services Act of 1949. The procurement power may be used by the President and Congress to achieve social and economic objectives. *Rossetti Contracting Co.* v. *Brennan,* 508 F.2d 1039, 1045 n.18 (7th Cir. 1974); *Northeast Construction Co.* v. *Romney,* 157 U.S. App. D.C. 381, 485 F.2d 752, 760 (1973). As the Court said in *NOPSI, supra,* "Those cases stand for the proposition that equal employment goals themselves, reflecting important national policies, validate the use of the procurement power in the context of the Order." 553 F.2d at 467.

Moreover, Congress has ratified the Executive Order program, including the use of quotas, to implement the affirmative action aspect. What was implicit in 1964 when Congress indicated that Title VII would not be the exclusive remedy for employment discrimination and permitted the Executive Order program to continue, was made explicit in 1972 when it turned back attempts to consolidate the OFCC with the EEOC and eliminate the use of quotas as a tool for achieving affirmative action

on the part of government contractors. *NOPSI, supra,* 553 F.2d at 467. Congress' action compels the conclusion that it intended the Executive Order program to continue and that it was concerned that the OFCC should continue to be the instrument for carrying out the Executive policy. Whatever doubts that may have existed concerning the validity of the Executive Power to implement the program were cured by Congress' action in 1972. 39 U.Chi. L.Rev., *supra,* at 723.

(b) *In authorizing racial quotas to increase minority representation in the skilled crafts, Executive Order 11246 serves a compelling governmental interest and does not violate the due process clause of the Fifth Amendment.*

Recognition of the fact that Executive Order 11246 permits Kaiser to use a racial quota to increase minority representation in the skilled crafts gives rise to the question of whether the Executive Order itself violates equal protection principles contained in the Fifth Amendment. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). We assume that because Kaiser's two-track seniority system uses race as a factor, the governmental purpose must be both legitimate and substantial and that the program's racial classification must be necessary to promote this interest. *Regents of the University of California* v. *Bakke,* 57 L. Ed.2d at 781, 786 (Powell, J.); *In re Griffiths,* 413 U.S. 717 (1973).

During the Congressional debates on the 1972 amendments to the Civil Rights Act of 1964, Rep. Mink described the purpose of the Contract Compliance Program in the following terms:

> Government contractors are among the largest and most influential in the Nation and the policies and practices which they adopt have a significant impact on the rest of the business community. Through the Government-wide contract compliance program, the OFCC seeks to prevent any indirect Federal sub-

sidization of employment discrimination and to guarantee that the Government's tremendous purchasing power operates as a force for social improvement.

Legislative History 298. Plainly, the government's interest in seeing that minorities are not excluded from employment opportunities which are generated by the expenditure of vast amounts of federal funds is substantial.[18] This is particularly true in this case which concerns the exclusion of blacks from the skilled trades. It is well-documented that the absence of blacks from the crafts nationwide was caused by blatant racial discrimination.

Kaiser's program was designed to address a particular problem: the absence of blacks from the craft families in its plants. The problem is a pervasive one in American industry and has its roots in history. Even before the Civil War, skilled black workers were regarded as rivals by white working men in both the North and the South. R. Kruger, SIMPLE JUSTICE, 52 (Vintage ed. 1977).[19]

[18] Furthermore, the government is at the height of its power in requiring companies it does business with to help advance societal goals: the government has the unrestricted power to decide with whom it will deal and the terms and conditions of the agreement. NOPSI, *supra*, 553 F.2d at 469. *See also, Atkin* v. *Kansas*, 191 U.S. 207 (1903); *Lochner* v. *New York*, 198 U.S. 45, 55, 64 (1905); *Ellis* v. *United States*, 206 U.S. 246, 256 (1907); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127-129 (1940); *United States* v. *Darby*, 312 U.S. 100, 115-116 (1941). While there are alternatives to Executive Order 11246 by which the Executive Branch may influence policy involving the expenditure of federal funds, each has significant limitations. 84 Harv.L.Rev., *supra*, at 1276-1277.

[19] Before the Civil War, there were numerous black craftsmen. Masters often hired out their slave craftsmen to others. E. Genovese, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE, 391 (1974). White craftsmen were hostile to free black craftsmen and attempted to drive them out of the professions. I. Berlin, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH, 229-232 (Vintage ed. 1976); E. Genovese, ROLL, JORDAN, ROLL, *op. cit. supra*, at 389 and sources cited in n.3. 41 C.F.R. 60-2.11 states that skilled crafts is one category in which minorities are likely to be underutilized.

After the war, tensions between workers of different races mounted. Northern workers resented blacks as competitors in the labor market and a depressant on wage levels: white Southern craftsmen feared competition from blacks who had been trained as slaves to be blacksmiths, bricklayers, or cabinet makers. *Id.* 52. Blacks were excluded from membership in the unions, beginning a pattern of hostility which was to last a hundred years. *See* R. Logan, THE BETRAYAL OF THE NEGRO, 147-162 (Collier ed. 1965). By World War II, "the most unrelenting practitioners of [racial] bias were the independent craft unions and affiliates of the American Federation of Labor, whose long standing antipathy to blacks never died." R. Kruger, SIMPLE JUSTICE at 228. A Kaiser official in this case testified that the lack of black skilled workers was "a direct result of employment discrimination over the years." (Tr. 142).

Discrimination against blacks in the trades was well entrenched by 1941 when, reacting to the threat of black leaders to commence massive demonstrations, President Roosevelt promulgated Executive Order No. 8802. 39 U. Chi. L. Rev., *supra*, at 725. The Executive Order, and those which followed, sought to ensure that jobs which were generated through expenditures of federal money would not be denied to some because of their race.

The court of appeals held that proof of past discrimination at the Gramercy plant was an essential precondition to upholding the validity of Kaiser's affirmative action program. 563 F.2d at 224. But judicial-type findings of fact of past discrimination are not required under Executive Order 11246.[20] As Sen. Williams, who

[20] Or, it appears, under the Constitution. In *Bakke*, this Court held that a race conscious affirmative action program would be valid if it meets exacting scrutiny under the equal protection clause of the fourteenth amendment. There was no evidence that the University of California medical school at Davis had ever practiced racial discrimination.

supported transferring the functions of the OFCC to the EEOC, said:

> The key to the Office of Federal Contract Compliance's approach is affirmative action. It is not a situation, although it could well be called one, of correcting persisting discrimination in its most well understood form. It involves an effort regardless of the past history of the employer to upgrade and improve its minority work force. In the affirmative action program, the concept of improving the quality of minority employment is commendable. It is necessary, and it is urgent. In the Department of Labor it has not worked well and should be transferred. The contract compliance program is necessary and important.

Legislative History 921. *See also Legislative History* 648 (remarks of Sen. Javits); 915 (remarks of Sen. Saxbe). *Cf. Rhode Island Chapter, Association of General Contractors* v. *Kreps*, 450 F. Supp. 338, 353-355 (D. R.I. 1978). Discrimination in the steel industry is well-documented.[21]

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[21] *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied sub nom. National Org. of Women* v. *United States* and *Harris* v. *Allegheny-Ludlum Industries, Inc.*, 425 U.S. 944 (1976). Kaiser's two other plants in Louisiana have been the subject of successful lawsuits charging employment discrimination. *Parson* v. *Kaiser Aluminum & Chemical Corp., supra; Burrell* v. *Kaiser Aluminum & Chemical Corp., supra* (consent decree, Feb. 24, 1975). A Kaiser spokesmen testified at trial that no employer in the United States had been free from discrimination against blacks prior to a given time in history. (Tr. 169). While he did not know of specific instances of discrimination at Gramercy, it was not his responsibility to pursue it. (Tr. 168). In his opinion, the small statistical presence of minorities in the craft groups indicated that there had been discrimination in those groups. (Tr. 146). He testified that minorities had not been permitted to participate in certain skilled occupations and therefore they couldn't be available in any quantity in the marketplace. (Tr. 146). This was no different at any of the Kaiser facilities. (Tr. 147).

The constitutionality of racial quotas under Executive Order 11246 has been consistently upheld. *E.E.O.C.* v. *A.T.&T., supra*, 556 F.2d at 178-80; *Associated General Contractors of Massachusetts* v. *Altshuler*, 490 F.2d 9, 16-19 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra*, 442 F.2d at 176. In requiring government contractors to take affirmative action, through the use of quotas if necessary, the Executive Order serves the substantial governmental interest of correcting the racial imbalance in the skilled crafts caused by historical discrimination. The remaining issue is whether the quota used is necessary to the accomplishment of this purpose, and, as we have demonstrated in Section I(2)(b), *supra*, on the particular facts of this case, it is.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the judgment below should be reversed.

Respectfully submitted,

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